

BETHEL C. VERNON

IBLA 78-437 (Supp.)

Decided May 19, 1980

Recommended decision by Administrative Law Judge Michael L. Morehouse following a hearing on the location of certain section and subdivision corners reestablished during a dependent resurvey of sec. 19, T. 13 S., R. 7 W., Willamette meridian, Oregon.

Recommended decision adopted; BLM decision affirmed.

1. Surveys of Public Lands: Dependent Resurveys

Where, at a hearing, a protestant does not meet his burden of establishing by clear and convincing evidence that a dependent resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing his protest against the survey will be affirmed.

APPEARANCES: Bruce L. Engel, Esq., Philomath, Oregon, for appellant; Lawrence E. Cox, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Bethel C. Vernon appealed from a decision dated April 24, 1978, wherein the Director, Bureau of Land Management (BLM), dismissed his protest against the dependent resurvey of sec. 19, T. 13 S., R. 7 W., Willamette meridian, Oregon. Inasmuch as factual questions about the

location of certain section and subdivision corners reestablished by the resurvey were unresolved on the record, this Board in Bethel C. Vernon, 37 IBLA 226 (1978), ordered a hearing pursuant to 43 CFR 4.415. It was pointed out that, at the hearing, appellant in challenging the Government resurvey would have the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

Following a hearing held at Corvallis, Oregon, on June 28, 1979, Administrative Law Judge Michael L. Morehouse submitted a recommended decision dated March 4, 1980, to the respective counsel for BLM and for appellant. Each was allowed a period of 30 days within which to submit his comments to this Board. Neither counsel has submitted any brief relative to the recommended decision.

The Secretary of the Interior may cause to be made such resurveys or retracements of the rectangular system of surveys of public lands as he may deem essential to mark the boundaries of the remaining public lands. 43 U.S.C. § 772 (1976).

The dependent resurvey is designed to restore the original conditions of the official survey according to the record. It is based, first, upon identified original corners and other acceptable points of control, and, second, upon the restoration of lost corners by proportionate measurement in harmony with the record of the original survey. Manual of Instructions for the Survey of the Public Lands of the United States (1973).

Surveys of the United States, after acceptance by BLM, are presumed to be correct and will not be disturbed except upon clear proof that they are fraudulent or grossly erroneous. An appellant challenging a Government survey has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Frank Lujan, 30 IBLA 95 (1977); Henry O. Woodruff, 24 IBLA 190 (1976).

We have reviewed the record established at the hearing and conclude that Judge Morehouse has accurately reported the material evidence and testimony therein given in his recommended decision to dismiss the protest of appellant. We adopt the recommended decision as the Board's decision in this matter and attach a copy of the Judge's decision as Appendix A.

The Judge succinctly summarized the testimony when he said that it indicated a difference of opinion between qualified surveyors, but hardly established by clear and convincing evidence that the resurvey was not an accurate retracement of the lines of the original survey.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of April 24, 1978, of the Director, Bureau of Land Management, dismissing the protest of Bethel C. Vernon against the dependent resurvey of sec. 19, T. 13 S., R. 7 W., Willamette meridian, Oregon, is reinstated and affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

March 4, 1980

BETHEL C. VERNON,	:	IBLA 78! 437
	:	
Appellant	:	Survey: Group 872, Oregon
	:	
	:	Involving protest of the
	:	dependent resurvey of
	:	Sec. 19, T. 13 E., R. 7 W.,
	:	Willamette Meridian, Oregon.

RECOMMENDED DECISION

This proceeding arises from the filing of a protest against a public land dependent resurvey of Sec. 19, T. 13 S., R. 7 W., Willamette Meridian, Oregon. The Chief, Division of Cadastral Survey, acting on behalf of the Director, Bureau of Land Management, dismissed the protest on the grounds that the dependent resurvey completed in 1975 was properly executed. The decision of the Bureau of Land Management found that the 1975 dependent resurvey properly relocated the section corner common to Secs. 17, 18, 19, and 20 and the south quarter corner of Sec. 19 by proportionate measurement because there was no conclusive evidence of the original corners.

Bethel C. Vernon appealed to the Interior Board of Land Appeals. On appeal, Mr. Vernon contended that the reestablishment of these corners by proportionate measurement was not necessary because there was ample evidence of original survey monuments and markings and that said evidence had been improperly rejected. Further, he requested that he be allowed to present evidence concerning the original survey monuments and markings at an evidentiary hearing. By order dated October 16, 1978, the Board referred the case to the Hearings Division, Office of Hearings and Appeals, for a hearing before an administrative law judge and directed that a recommended decision be submitted to the Board. The Board went on to state:

Appellant, in challenging the government resurvey, has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Henry O. Woodruff, 24 IBLA 190 (1976).

The hearing was held on June 28, 1979, at Corvallis, Oregon. Appellant was represented by Bruce L. Engel, Esq. Mr. Lawrence E. Cox, Office of the Solicitor, Department of the Interior, Portland Region, appeared in behalf of the

Bureau of Land Management. The parties have submitted posthearing briefs, the last having been received on November 9, 1979.

The corner of Secs. 17, 18, 19, and 20 was surveyed by Dennis Hathorn in 1856. He set a wood post for the corner and marked the following bearing trees:

A dogwood, 6 ins diam., bears N. 68 degrees E., 91 lks. dist.

A fir, 24 ins. diam., bears S. 5 degrees E., 21 lks. dist.

A fir, 18 ins. diam., bears S. 8 degrees W., 75 lks dist.

A maple, 12 ins. diam., bears N. 59 degrees W., 89 lks. dist.

In 1891, Robert O. Collier surveyed the remaining boundaries of Sec. 19 and remonumented the corner of Secs. 17, 18, 19, and 20. Collier stated in his field notes that the original post "was become obliterated" and in its place set a stone 10 x 10 x 8 ins. marked with three notches on the south and five notches on the east edges. He described the first three Hathorn bearing trees as follows:

A dogwood, 6 ins. diam., bears N. 78 degrees E., 86 lks. dist., properly marked.

A fir, 24 ins. diam., bears S. 5 degrees E., 21 lks. dist., properly marked.

A fir, 18 ins. diam., bears S. 8 degrees W., 75 lks. dist., properly marked.

He could not find the maple, the fourth bearing tree marked by Hathorn, and in its place marked a new bearing tree:

A fir, 30 ins. diam., bears N. 15 degrees W., 64 lks. dist., marked
T13S R7W S18 BT.

By special instructions dated May 23, 1975, a dependent resurvey of Sec. 19 was ordered to determine the extent of an alleged timber occupancy trespass. It was to be done in accordance with the provisions of the 1973 Manual of Surveying Instructions (Manual) and was done by Larry D. Evans, a BLM cadastral surveyor between July 29 and October 1, 1975. Mr. Evans testified that he first located the southeast corner of Sec. 19 which was a good corner and then ran north locating the east quarter corner. He continued north and was unable to find the corner common to Secs. 17, 18, 19, and 20. He located the east quarter corner of Sec. 18 and again looked for the section corner of 17, 18, 19 and 20 with no success. He then went clockwise around Sec. 19. He stated he did not think the south quarter corner of Sec. 19 was a good corner. He found

the southwest section corner, the west quarter corner and the northwest corner. He was unable to locate the north quarter corner and testified that he spent approximately two and one-half days looking for the corner common to Secs. 17, 18, 19, and 20. He could find no evidence of the original corner. He looked for a stone since Collier had remonumented the corner with a stone but discounted the value of a stone found in the area since in his opinion there were no manmade marks on it. Also, he could find none of the original bearing trees. He spent some time trying to find bearing marks on the trees in the vicinity of the stone but could find none. He therefore reestablished the corner by proportionate measurement according to the manual.

Mr. Bert Udell, a professional land surveyor, testified that he examined the general area of this corner with Brian Vernon, Bethel Vernon's son, in July, 1977. He had with him copies of the original Hathorn and Collier field notes. He found a stake roughly 4 feet long that appeared to have slicing across one end such as an ax would make. He observed that this was a very pitchy stake which would preserve the wood over a long period of time. It was his opinion that this could be the stake originally placed by Hathorn. Approximately 4 feet from the stake was found a rock approximately 10 X 9 X 7 ins. which appeared to have

some type of manmade markings on it. Hathorn's northwest bearing tree was a maple 12 ins. in diameter, and Udell found a clump of young maples in the northwest quadrant. He stated the distance checked out but the bearing angle was off quite a bit. He surmised that the maple clump could be sprouts from the original obliterated maple. Udell also found a clump of dogwood in a kind of ring in the northeast quadrant close to the distance and bearing recorded by both Hathorn and Collier. He felt that the original dogwood might have occupied the center of the ring and had long since died and rotted. In addition, he found a 30-inch fir snag in the southeast quadrant whose distance and bearing checked out. Mr. Udell stated that the Collier notes indicated that the Hathorn stake had become obliterated. This did not necessarily mean that the stake had become obliterated only the markings on the stake. It was his opinion that Collier found the original Hathorn stake without the markings and remonumented the corner with the stone. He felt that the stake he found was the original Hathorn stake and the stone was the Collier remonumentation. Also, the stone was within 2 to 3 feet of a topographic call from a nearby creek contained in Collier's notes. It was his opinion that these factors considered together constituted sufficient evidence to justify placing the corner where the rock was found.

Mr. Leonard Murphy, a BLM cadastral surveyor for the last 20 years, testified that he and two other BLM surveyors met with Mr. Udell and Brian Vernon in August, 1977, to examine the area of the stake and the stone. Udell pointed out certain trees that he thought might be original bearing trees of record. However, he (Murphy) could find no evidence that these were in fact original bearing trees. He looked a long time for scribe marks and could find none. He examined the stake that Udell had found, but to him this simply looked like a fragment from a nearby snag. In addition, he did not believe that a stake set by Hathorn in the 1850s could have survived for that length of time due to the heavy rainfall in the area. He also examined the stone that was lying loose on the ground and was never convinced that the markings on it had been made by Collier in 1892.

Mr. William Glenn, Chief Cadastral Surveyor, Oregon State Office, testified that having heard the testimony of Mr. Evans, Mr. Udell, and Mr. Murphy, and having viewed the area on the day of the hearing, was of the opinion that the section corner was a lost corner at the time Larry Evans surveyed the area and that the corner was properly reestablished by proportionate measurement.

Collier surveyed the line between Secs. 19 and 30 and set the south quarter corner of Sec. 19 in 1891-92. He set a wooden post for the quarter corner and marked two bearing trees:

A maple, 24 ins. diam., bears N. 34 degrees E., 57 lks, dist.

A maple, 18 ins. diam., bears S. 22 degrees W., 25 lks. dist.

In 1954, Howard Taylor, a surveyor employed by Mr. Udell, was doing survey work in the area of the quarter corner and located two maple trees which he believed to be the original bearing trees. However, he found no scribing on either of these trees. In 1975, Evans could find no evidence of the original quarter corner and could find no bearing trees. At the time, he was aware that Taylor had been there in 1954 and he spent some time cutting into the trees located by Taylor in an attempt to find scribe marks. He found none. Thereafter, he reestablished the corner by proportionate measurement.

Udell, sometime following his inspection of the area of the section corner, examined the area of the quarter corner. He testified that he found both maple trees and swung a tape from each tree and where the arcs intersected, scalped the

ground with a shovel hoping to find a sign of an old stake hole. He found a 3 X 3 inch depression below the ground surface which appeared to him to contain the rotted remains of a stake (see pictures contained in Ex. R-1). He felt that this depression was where Collier had driven his stake in 1891. Also there was a distance correlation from the depression to the top of nearby ridge which checked with one of Collier's topographic calls. Due to these factors, he felt that the corner should have been located at the place of the 3 X 3 inch depression.

Mr. Peter Peterson, a BLM cadastral surveyor with 22 years experience, examined the area of the south quarter corner in January, 1978. He testified he found the two maple trees. One was rotted out so that no original marking would still be in existence and he thought the other was too young to be an original bearing tree. He also examined the 3 X 3 inch depression, but stated that he was really looking for a post or the remains of a post set in 1954 because a memorandum from Washington had advised him that surveying had been done in the area in 1954. He stated that the topographic call to the top of the ridge meant nothing because the ridge is very wide and flat. It was his opinion that the existence of the two maple trees was simply not enough evidence to establish the corner at the 3 X 3 inch depression.

Mr. Glenn also testified that after having heard the evidence concerning the area of the south quarter corner and having viewed the area, it was his opinion that it was a lost corner and that Evans followed the proper procedures for reestablishment.

The manual defines a "lost corner" as:

5-20. A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners.

5-21. The rules for restoration of lost corners should not be applied until all original and collateral evidence has been developed. When these means have been exhausted, the surveyor will turn to proportionate measurement, which harmonizes surveying practice with legal and equitable considerations. This plan of relocating a lost corner is always employed unless outweighed by conclusive evidence of the original survey.

Appellant contends that Evans failed to follow the procedures prescribed in the manual in that he did not take into account all evidence of the originally described corners before reestablishment by proportionate measurements. In

addition, appellant asserts that Evans' rejection of the original survey locations of the subject corners is inconsistent with his acceptance of the original location of the west quarter corner of Sec. 19 which he located in the same dependent resurvey. In his brief he quotes Sec. 6-12 of the manual in part to the effect:

That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

However, Sec. 6-13 of the manual states:

Bona fide rights are those acquired in good faith under the law. A resurvey can affect bona fide rights only in the matter of position or location on the earth's surface. * * *

The record shows that the resurvey was ordered because there was some question as to a timber trespass along the lines in question. It also indicates that appellant at the time of the resurvey had no title to lands in Sec. 19 and had no interest other than a previous logging of a portion of the section. It is true, as appellant and the manual points out:

6-15. The position of a tract of land, described by legal subdivisions, is absolutely fixed by the original corners and other evidences of the original survey and not by occupation or improvements, or by the lines of a resurvey which do not follow the original. * * * Under fundamental law the corners of the original survey are unchangeable. Even if the original survey was poorly executed, it still controls the boundaries of land patented under it.

In addition:

6-25. The dependent resurvey is designed to restore the original conditions of the official survey according to the record. It is based, first, upon identified original corners and other acceptable points of control, and, second, upon the restoration of lost corners by proportionate measurement in harmony with the record of the original survey. * * *

Also:

5-7. * * * No set rules can be laid down as to what is sufficient evidence. Much must be left to the skill, fidelity, and good judgment of the surveyor, bearing in mind the relation of one monument to another and the relation of all to the recorded natural objects and items of topography.

With respect to the section corner it is clear that Evans had with him the notes of the original Hathorn and later Collier survey. He took into consideration all evidence of

the originally described corner, but could not find "conclusive evidence" that was satisfactory to him of the original corner and therefore followed the manual directions in reestablishing the corner by proportionate measurement. His restoration of the west quarter corner is not inconsistent with the procedures he followed in restoring the section corner and south quarter corner. According to Mr. Vernon, a Mr. Bruce Starker, who is deceased, reset the west quarter corner in 1941 or 1942 by setting an axle shaft in the ground near an old cedar stump; the implication being that Starker restored the corner with a minimum of ceremony. This west quarter corner was accepted by Evans during his dependent resurvey because the County Surveyor's Office had a record of an axle perpetuating the corner:

There was an axle there and an original cedar tree, and as I recall, another accessory, and it's our practice that if there is a perpetuation of a corner that is of record and, you know, it fits the ground conditions, that we will accept that evidence. (Tr. 18)

It is obvious that Evans was satisfied with the evidence concerning the west quarter corner, whereas he was not as regards that concerning the section corner and south quarter corner. With respect to the south quarter corner,

although Evans did not talk to Udell or Taylor prior to relocating it, he was aware that Taylor had been there and found two maple trees. In fact, as previously noted, he spent some time cutting into the trees trying to find bearing marks prior to deciding that there was insufficient evidence that these were the original bearing trees.

What the dispute comes down to is a difference of opinion as between Evans and Udell. This is made clear by Udell's statement regarding Evans' work: "I'm not saying, sir, that he didn't do the job correctly" (Tr. 108), and in answer to the following question: "JUDGE MOREHOUSE: I take it, if you had been in Mr. Evans' position, you would have put that corner there, is that right? A. I would." (Tr. 131).

As previously noted this indicates a difference of opinion but hardly establishes by clear and convincing evidence that the resurvey is not an accurate retracement of the lines of the original resurvey.

Accordingly, the appeal is dismissed.

Michael L. Morehouse
Administrative Law Judge

